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Government Takings and Constitutional Guarantees: When Date of Valuation Statutes Deny Just Compensation

I. INTRODUCTION

Perhaps the oldest case of a government's exercise of eminent domain is recorded in the Bible.¹ King Ahab, ruler in Israel, saw and desired to possess Naboth's vineyard, a fertile plot of land located near Ahab's home.² Ahab, not necessarily disposed to tyrannically expropriating his subjects' property, offered Naboth another vineyard or money for the property.³ Naboth refused, for which he was ultimately stoned to death.⁴ Ahab gained his desire and even apparently avoided paying compensation.⁵

Today, the effects of exercising the eminent domain right are much less severe for landowners than in Naboth's case. Federal and state governments in the United States may exercise the right only to take land for a "public use" and only if they also compensate the landowners for the value of the condemned⁶ property. Compensa-

1. See CARMAN F. RANDOLPH, *THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* § 4 (photo. reprint 1991) (1894).

2. 1 *Kings* 21:1–2 (King James).

3. *Id.*

4. *Id.* at 21:3–4, :13–14. Naboth refused to sell because to do so would have violated his religious law; he said to Ahab, "The Lord forbid it me, that I should give the inheritance of my fathers unto thee." *Id.* at 21:3; see also *Deuteronomy* 19:14 (King James).

Naboth's stoning was effected through two false witnesses. 1 *Kings* 21:11–13. After Ahab learned that Naboth would not sell, he returned home sulking and complaining. *Id.* at 21:4. When Ahab's wife Jezebel discovered what was wrong, she responded, likely exclaiming to her husband, "Dost thou now govern the kingdom of Israel?" *Id.* at 21:7. Jezebel immediately set about devising Naboth's death. See *id.* at 21:7–10. She wrote letters in Ahab's name to local officials who arranged for two witnesses to testify that Naboth had blasphemed God and the king. *Id.* at 21:8–14. The penalty for such a crime was death by stoning. See *id.* at 21:13; *Leviticus* 24:16 (King James).

5. Ahab actually paid sorely for his taking. As he went to possess Naboth's vineyard, he encountered Elijah, a prophet, who cursed him for killing Naboth and possessing his inheritance. 1 *Kings* 21:17–29.

6. Often, the concepts "eminent domain" and "land condemnation" are used interchangeably, though they are clearly distinct. While "eminent domain" is the *right* of the government to take land, denoting an inherent capacity, "land condemnation" is the *act* of taking the land. See J.D. EATON, *REAL ESTATE VALUATION IN LITIGATION* 13 (2d ed. 1995).

tion—or “just compensation,” as it appears in the United States Constitution⁷—requires that the landowner be put in the position he or she would have occupied had the government not taken the land.⁸ While this notion of just compensation has not always accompanied the eminent domain right,⁹ it is difficult to imagine a just scheme today that fails to compensate landowners for government takings.¹⁰ In any event, the Constitution requires it.

Despite the need for providing just compensation, determining the proper amount in individual cases has presented a significant challenge to courts and legislatures. The challenge arises in part because land values change over time, and so, in order to make a present value determination, a court or a legislature must set a date on which to value the property. In a majority of states, this valuation date is set by statute. Unfortunately, these valuation date statutes can become controversial when a significant time period passes between the valuation date and the time the government actually takes the land if the land’s value materially changes during that period. If the land value increases significantly, then paying the landowner the amount determined on the date of valuation is not adequate compensation, and the date of valuation statute fails to provide the constitutionally required just compensation.

Notwithstanding the constitutional importance of this valuation problem, the principle of just compensation and its related valuation date issue have not been dominant themes in eminent domain jurisprudence. In fact, since the Supreme Court’s 1922 decision in *Pennsylvania Coal Co. v. Mahon*,¹¹ the topic of regulatory takings—takings effected by government regulation rather than through direct action against landowners—has commanded the majority of atten-

7. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

8. See *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).

9. See EATON, *supra* note 6, at 14; see also *infra* Part II.A.

10. This assertion is not to say that the government can never take property without compensating the owner. The police, war, and tax powers all permit the government to take private property without compensation, but these powers are theoretically distinct from the eminent domain right. See RANDOLPH, *supra* note 1, §§ 8–25.

11. 260 U.S. 393 (1922). *Pennsylvania Coal* represented a significant turn in takings jurisprudence. For the first time, the Supreme Court ruled that a government-imposed regulation could actually constitute a taking of private property for public use. See *id.* at 414–16. Consequently, the landowner in *Pennsylvania Coal* had a right to compensation for the damages suffered as a result of the regulation. See *id.* at 415–16.

tion when courts and academics have examined eminent domain jurisprudence.¹² This attention likely arises from the difficulties associated with determining when a government regulation is actually a taking of private property for public use—there is much room for debate. Nevertheless, within the realm of direct land condemnation, valuation date law has been more quietly developing, and the application of various valuation date statutes in recent years has imbued the topic with renewed vigor.¹³

This Comment outlines the parameters of the valuation date problem, which often pits statutory provisions against state and federal constitutional mandates. Part II provides insight into the valuation date problem by laying out historical eminent domain underpinnings and a just compensation framework. It also discusses each of the fifty states' varying statutory positions (or lack of positions) on dates of valuation.¹⁴ Part III examines the date of valuation problem, as well as the related takings date problem and summarizes several leading judicial responses to conflict between statutory dates of valuation and the constitutional just compensation requirement. Before a brief conclusion in Part V, Part IV tracks possible legislative reactions to the date of valuation problem. Ultimately, this Comment suggests guidelines for providing just compensation when a date of valuation statute fails to meet the constitutional mandate.

12. See Nicholas Mercuro, *The Takings Issue: A Continuing Dilemma in Law and Economics*, in *TAKING PROPERTY AND JUST COMPENSATION: LAW AND ECONOMICS PERSPECTIVES OF THE TAKINGS ISSUE* 1, 1–6 (Nicholas Mercuro ed., 1992), for a discussion that characterizes the problem of determining when government regulation becomes a taking as *the* takings issue.

Because of its scope, this Comment will not include much discussion of the regulatory takings issue. There is, however, a wealth of literature on the topic as it continues to demand the attention of some of the nation's leading scholars. See, e.g., *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES* (Thomas E. Roberts ed., 2002); I THOMAS J. MICELI & KATHLEEN SEGERSON, *THE ECONOMICS OF LEGAL RELATIONSHIPS: COMPENSATION FOR REGULATORY TAKINGS* (Nicholas Mercuro ed., 1996); *TAKING PROPERTY AND JUST COMPENSATION* (Nicholas Mercuro ed., 1992).

13. For examples of recent state cases dealing with these statutes, see *infra* Part III.B.2.

14. This Comment focuses on statutory valuation date standards. Necessarily, every state has articulated some kind of valuation date standard; slightly more than half have done so through statute. See *infra* app. Other states use judicially-created standards, which are already well documented in treatise material. See, e.g., 5 JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 18.16 (3d ed. 2001); 11A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 32.97 (3d ed. 2000).

II. EMINENT DOMAIN, JUST COMPENSATION, AND VALUATION DATE STATUTES

Date of valuation statutes have grown out of an administrative need for states to define procedures that govern the exercise of the eminent domain right. Despite this administrative need, however, state eminent domain procedures ultimately must abide by the theoretical underpinnings of the eminent domain right and the principle of just compensation. This Part of the Comment describes these underpinnings and provides a context in which to view the valuation date problem described in Part III. Section A speaks in general terms about the history of the eminent domain right and the constitutional principle of just compensation, and section B focuses on the states' varied statutory approaches to valuation date determination.

A. Historical and Constitutional Framework for the Government's Eminent Domain Right

The right of eminent domain inheres in the power of a sovereign.¹⁵ Importantly, eminent domain is a right, not actual control or ownership, and until the government exercises the right, the government cannot properly use the private property of individuals¹⁶ unless operating under the police, war, or taxation powers. Because governments have the eminent domain right by virtue of being the government, a constitution cannot technically grant this power,¹⁷ though it can limit the power as exercised. Consequently, the United States Constitution and almost all state constitutions include provisions that relate to this governmental power.¹⁸

15. See RANDOLPH, *supra* note 1, § 3 (“There must be a common basis for federal and state eminent domain, and it is found in sovereignty pure and simple.”).

16. See *id.* § 2. The original Latin term “dominium eminens” has become our modern-day “eminent domain.” See *id.* Randolph explains that the translation of the term “dominium” into “domain,” which signifies the right to control a thing, rather than “dominion,” which signifies a thing controlled, emphasizes the term’s precise meaning. *Id.*

17. See EATON, *supra* note 6, at 14.

18. See Sidney Z. Searles, *The Law of Eminent Domain in the U.S.A.*, A.L.I.-A.B.A. COURSE OF STUDY: EMINENT DOMAIN AND LAND VALUATION LITIGATION 333, 335–36 (1995). The only exception is North Carolina, which has a statutory eminent domain scheme that limits the government’s eminent domain right. *Id.*

A brief historical sketch of the nature and extent of the eminent domain right is helpful to understanding its constitutional impact. While the ultimate origin of the concept of eminent domain is unknown,¹⁹ the right has found expression in a variety of bygone cultures, including the ancient Greek and Roman societies²⁰ and the English feudal order, in which sovereign lords could effectively take land they desired without compensating those who previously used it.²¹ The earliest use of the term “eminent domain” was probably in the seventeenth century writings of Hugo Grotius, who stated that “the property of subjects under the law of eminent domain belongs to the state, so that the state, or the person who represents the state, can make use of that property, can even destroy or alienate it . . . whenever it is to the public advantage.”²² The first formal declaration of the related just compensation principle occurred in France’s 1789 Declaration of the Rights of Man and of the Citizen: “Property being an inviolable and sacred right, no one can be deprived of it unless the public necessity plainly demands it, and upon condition of a just and previous indemnity.”²³

In the latter end of the eighteenth century, certain philosophical views came to bear not only on those who drafted France’s Declaration of the Rights of Man, but also on the Framers of the United States Constitution. Chiefly, John Locke’s writings influenced the Founders’ views on private property and their intention that the Constitution protect private property rights.²⁴ Locke emphasized that individual labor created property rights.²⁵ Commenting on the power of eminent domain (though not

19. EATON, *supra* note 6, at 14.

20. See RANDOLPH, *supra* note 1, § 4; see also Searles, *supra* note 18, at 335 (citing CORNELIUS TACITUS, THE ANNALS OF TACITUS (Encyclopedia Britannica 1952)).

21. See RANDOLPH, *supra* note 1, § 5; Searles, *supra* note 18, at 335.

22. HUGO GROTIUS, THE LAW OF WAR AND PEACE 402 (Louise R. Loomis trans., Walter J. Black, Inc. 1949) (1625); see also RANDOLPH, *supra* note 1, § 5; Searles, *supra* note 18, at 335.

23. RANDOLPH, *supra* note 1, § 6 (quoting DECLARATION OF THE RIGHTS OF MAN, art. XVI (1789)).

24. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 16 (1985).

25. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT paras. 27–32, at 17–20 (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690) (“[E]very man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands, we may say, are properly his As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property.”).

explicitly calling it so), Locke said, “[T]he supreme power cannot take from any man part of his property without his own consent”²⁶ Indeed, in Locke’s view, the purpose of a government’s existence is to preserve private property,²⁷ and he would condition a government’s exercise of the eminent domain right on the consent of the governed.²⁸ Some commentators suggest that Locke’s “consent” is a flaw in his theory, even though he later explains that it is “tacit consent” in the representative democracy.²⁹ To make Locke’s theory viable, one commentator concluded that the idea of consent must be replaced with “just compensation.”³⁰ In any event, the influence of Locke’s emphasis on private property is evident in the Framers’ efforts to protect this individual right through the Bill of Rights.³¹

26. *Id.* para. 138. To some degree, Locke thought that this power to prevent a taking without consent is the very essence of property: “[I]ndividuals] have such right to the goods which by the law of the community are theirs, that nobody has a right to take their substance or any part of it from them without their own consent; without this, they have no property at all” *Id.*

27. *Id.* Locke explains:

[F]or the preservation of property being the end of government and that for which men enter into society, it necessarily supposes and requires that the people should have property; without which they must be supposed to lose that, by entering into society, which was the end for which they entered into it—too gross an absurdity for any man to own.

Id.

28. *Id.*

29. *Id.* para. 164.

30. See EPSTEIN, *supra* note 24, at 14–15 (“The categorical command that property shall not be taken without tacit consent must therefore be rewritten to provide that property may be taken upon provision of just compensation.”).

31. See U.S. CONST. amend. V; see also EPSTEIN, *supra* note 24, at 7–18. Professor Epstein discusses in detail the influence that the modern philosophers Thomas Hobbes and John Locke had on the Constitution’s formation. In reference to Locke’s influence, Epstein writes:

The Lockean system was dominant at the time when the Constitution was adopted. His theory of the state was adopted in Blackstone’s *Commentaries*, and the protection of property against its enemies was a central and recurrent feature of the political thought of the day. Although protection of private property was a central objective of the original constitutional scheme, the Constitution was not one eminent domain clause writ large At every turn the constitutional concern is with preventing the concentration of power in a few hands Within the [Constitution’s] original framework the rich array of procedural and jurisdictional protections was expected to serve some substantive end. And that end was, of course, the protection of private property, of “lives, liberties, and estates” that Locke considered the purpose of government. The procedural safeguards worked to

Today, every level of government in the United States may exercise the right of eminent domain: from the federal government, to states, to counties, to cities, and even to local government subdivisions.³² As noted, this right inheres in the sovereign's power, so it should come as no surprise that there is no mention of the eminent domain right in the original articles of the United States Constitution and no clear expression of it in any of the Constitution's amendments. In fact, the federal government's eminent domain right was not explicitly recognized by a branch of the government until the Supreme Court decided *Kohl v. United States*³³ in 1875. True, the eminent domain right is implied by the Constitution's Fifth Amendment, but this recognition came as a protection of an individual liberty, rather than as a grant of governmental power. The source of the eminent domain right is sovereignty.

The Fifth Amendment's language—"nor shall private property be taken for public use, without just compensation"³⁴—dictates two limitations on exercising the eminent domain right. First, the "public use" limitation prohibits the federal government from taking land for any private advantage. It is a term that courts today interpret very broadly, permitting an array of government objectives under the cover of eminent domain exercise.³⁵ The second limitation, which is

guarantee by indirection that the government would not pass laws that encroached upon the property rights that government was designed to protect.

Id. at 16–17 (citations omitted). Focusing on the Bill of Rights, Epstein continues:

The Bill [of Rights] identifies the ends of government, the rights that the system of limited jurisdiction, indirect voting, and separation of powers is designed to protect. Here the brute fact of federalism complicates the application of political theory, for the Bill of Rights functioned originally as a limitation upon the federal government and not upon the power of the states, a point which was explicitly and correctly held by Justice Marshall for a unanimous court in *Barron v. Baltimore*. Limitations upon the powers of the state have been answered in practice by incorporating specific protections for individuals against the state as well, including the eminent domain clause.

Id. at 18 (footnotes omitted).

32. See Searles, *supra* note 18, at 336.

33. 91 U.S. 367, 371 (1875) ("Such an authority [to appropriate land or other property in the states] is essential to [the federal government's] independent existence and perpetuity The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States.").

34. U.S. CONST. amend. V.

35. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (holding that a Hawaii statute breaking up large land holdings held in trusts was a permissible taking for

the subject of this Comment, is “just compensation,” and it requires the government to pay the landowner a fair amount for any taking.³⁶

While the eminent domain right is of ancient origin, the requirement of just compensation is a more recent historical development.³⁷ In fact, as late as the Civil War years, some state governments were exercising their eminent domain right without paying compensation.³⁸ The Fifth Amendment’s private property protections, which include the just compensation requirement, have now long applied to all the states via the Fourteenth Amendment, as incorporated by Supreme Court case law.³⁹ Additionally, each state has its own constitutional or statutory eminent domain laws that similarly limit state and local government exercise of the eminent domain right.⁴⁰ All government must compensate landowners when taking land.

Hence, the landowner-friendly compensation principle tempers the otherwise harsh power of the government to take an individual’s private property. Importantly, the U.S. Constitution and many of the state constitutions include the words “just” or “due” with the term “compensation.”⁴¹ Some commentators assert that the word is superfluous,⁴² but others, including courts, indicate that the term

“public use”); *see also* Searles, *supra* note 18, at 342.

36. The brief “public use” discussion in this paragraph only fills out the background section of the Comment. The focus of this Comment is whether valuation date statutes deny just compensation, so “just compensation” necessarily receives more attention.

37. *See* EATON, *supra* note 6, at 14 (“Many early definitions of eminent domain, including those applied in the United States, did not include a provision for just compensation.”). The idea of just compensation appeared in the writings of Grotius in connection with his expression of the eminent domain right. *See* GROTIUS, *supra* note 22, at 403 (“[T]he state is bound to make good out of the public funds the damage to those who have lost what was theirs . . .”); Searles, *supra* note 18, at 335.

38. *See* EATON, *supra* note 6, at 14; *see also* *Lindsay v. Comm’rs*, 2 S.C.L. (2 Bay) 38 (1796); *State v. Dawson*, 21 S.C.L. (3 Hill) 100 (1836).

39. *See* *Dolan v. City of Tigard*, 512 U.S. 374, 405 (1994); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897).

40. *See* Searles, *supra* note 18, at 335–36.

41. *See, e.g.*, U.S. CONST. amend. V; ILL. CONST. art. 1, § 15 (“just compensation”); IOWA CONST. art. 1, § 18 (“just compensation”); KAN. CONST. art. 12, § 4 (“full compensation”); VT. CONST. ch. I, art. 2d (“equivalent in money”); *see also* EATON, *supra* note 6, at 16 (“Terms such as *adequate*, *reasonable*, and *due* are used in some constitutions in conjunction with *compensation*.”).

42. *See* RANDOLPH, *supra* note 1, § 223, at 205–06 (“The word [sic] ‘just,’ ‘full,’ ‘adequate,’ ‘due,’ or ‘reasonable,’ prefixed to ‘compensation’ in constitution or statute, does not carry any definite weight. None of these prefixes can enlarge or restrict the definition of property, nor affect the measure of compensation.”); EATON, *supra* note 6, at 16.

“just compensation” shows that compensation must ultimately be fair for both the landowner and the government.⁴³ Whatever the term “just” adds or does not add to “compensation,” “just compensation” may be defined as paying the property owner the value—normally the fair market value on the date of valuation—of the taken property. The compensation must be paid in money,⁴⁴ and it must include interest for any delay in making payment.⁴⁵ The “fair market value” of a property is “what a willing buyer would pay in cash to a willing seller” at the time of valuation.⁴⁶

The policy of just compensation is to put the property owner in as good a position as he or she would have occupied if the taking had not occurred.⁴⁷ Thus, the government must spread the individual landowner’s loss throughout the community, rather than force the landowner to contribute more than his or her proper share to the public improvement.⁴⁸ At a more fundamental level, two interests support the “same position” policy: fairness and respect for

43. *See, e.g.*, Searles, *supra* note 18, at 343 (citing *Searl v. Sch. Dist. Number 2 in Lake County*, 133 U.S. 553 (1890)); *Utah State Rd. Comm’n v. Friberg*, 687 P.2d 821, 830 n.8 (Utah 1984).

44. *See* Searles, *supra* note 18, at 343.

45. *See id.* (citing *Jacobs v. United States*, 290 U.S. 13 (1933)).

46. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984) (citation omitted). The Court went on to explain that the “fair market value” standard of just compensation does not generally account for the value an individual owner may place on property, but it is nevertheless an administratively necessary standard:

We have acknowledged that, in some cases, this standard fails fully to indemnify the owner for his loss. Particularly when property has some special value to its owner because of its adaptability to his particular use, the fair-market-value measure does not make the owner whole. We are willing to tolerate such occasional inequity because of the difficulty of assessing the value an individual places upon a particular piece of property and because of the need for a clear, easily administrable rule governing the measure of “just compensation.”

Id. at 10 n.15. (citations omitted).

47. *See Kirby Forest*, 467 U.S. at 10; *see also Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336–37 (1893).

48. *See Saratoga Fire Prot. Dist. v. Hackett*, 118 Cal. Rptr. 2d 696, 701 (Ct. App. 2002) (quoting *L.A. County Metro. Transp. Auth. v. Continental Dev. Corp.*, 66 Cal. Rptr. 2d 630, 644 (1997) and interpreting the just compensation provision of the California Constitution). Distributing the loss “throughout the community” entails drawing on public funds that the government has already collected or will collect through taxation or other assessment.

Notably, a condemned property’s value may decrease based merely on the announcement of the condemnation action. *See* 5 SACKMAN, *supra* note 14, § 18.16 (3d ed. 2001); *infra* note 95. This depreciated value cannot be the compensation provided to the owner if the “same position” policy is to be maintained.

private property. Some courts have explicitly relied on the interest of fairness to hold that a government entity cannot require a landowner to surrender property, particularly property on which he or she lives, without compensating the owner for the loss.⁴⁹ Furthermore, the United States has a rich heritage of private property ownership, inspired in many ways by the writings of John Locke,⁵⁰ so even if the Constitution did not require compensation, courts would likely enforce this historical respect for property by requiring compensation.

Every state today recognizes the principle of just compensation and by some means guarantees it to owners who must surrender their property to a condemnor⁵¹ for a public use.⁵² Importantly, and without question, the federal Constitution is controlling in all jurisdictions. While states may formulate and adopt their own procedures for condemnation actions—and all do—the constitutional mandate that just compensation be provided must obtain in every case. Unfortunately, state laws vary as to their application of the just compensation principle, and not all of them clearly abide by the Constitution's compensation mandate. Specifically, before a condemnor can award just compensation, it must properly determine the compensation amount, which requires setting a date of valuation.⁵³ Many states set the valuation date by

49. See, e.g., *Utah State Rd. Comm'n v. Friberg*, 687 P.2d 821, 828 (Utah 1984) ("The constitutional requirement of just compensation derives 'as much content from the basic equitable principles of fairness as it does from technical concepts of property law'").

In the spirit of fairness, some states go beyond the just compensation requirement by devoting code sections to requiring condemning authorities to assist with moving landowners displaced by a condemnation proceeding. See, e.g., 42 U.S.C. § 4622 (1995); CAL. GOV'T CODE § 7262 (1995); 26 PA. CONS. STAT. § 1-601A (1997). But see 4A SACKMAN, *supra* note 14, § 14A.02[4][c].

50. See *supra* notes 24–31 and accompanying text.

51. Governments may delegate their eminent domain right, and they often do. For example, entities such as utilities companies frequently exercise the delegated eminent domain right. See Searles, *supra* note 18, at 336. From this point forward, I will refer to the condemning entity as "condemnor," rather than "government," since the condemnor might not be a government entity. The requirement of just compensation is the same whether the condemnor is a government entity or a corporation exercising delegated power.

52. See 3 SACKMAN, *supra* note 14, § 8.01 n.14 (listing cases from each of the fifty states that adopt the compensation requirement); Searles, *supra* note 18, at 335–36; see also EATON, *supra* note 6, at 546–48 (chart listing the eminent domain constitutional provisions from each state constitution).

53. The need for state governments to determine a time of valuation is not novel. See RANDOLPH, *supra* note 1, § 285, at 262.

statute, and, perhaps not surprisingly, there are nearly as many methods for setting the valuation date as there are states that have created legislation on the topic.

B. Date of Valuation Statutes

1. State provisions

Historically, most courts identified the date of taking as the date of valuation.⁵⁴ The rationale behind using this date was that the land should be valued at the time that the landowner was entitled to receive compensation—that is, at the time that the landowner gave up his or her rights to it.⁵⁵ However, where state condemnation procedures do not permit the condemnor to take until after a trier of fact⁵⁶ assesses compensation, it is clear that the valuation date cannot

54. *See id.* (citing a series of nineteenth century cases holding that the date of valuation is the date of taking, including *Tex. & St. Louis Ry. Co. v. Cella*, 42 Ark. 528 (1884); *Lafayette, Muncie & Bloomington R.R. Co. v. Murdock*, 68 Ind. 137 (1879); *Chi., Kan. & Neb. Ry. Co. v. Broquet*, 28 P. 717 (Kan. 1892); *Cobb v. City of Boston*, 109 Mass. 438 (1872); *Mo. Pac. Ry. Co. v. Hays*, 18 N.W. 51 (Neb. 1883); *Stafford v. City of Providence*, 10 R.I. 567 (1873); *Tex. & St. Louis R.R. Co. v. Matthews*, 60 Tex. 215 (1883)).

55. *See* 3 SACKMAN, *supra* note 14, § 8.05; 11A MCQUILLIN, *supra* note 14, § 32.97, at 153. An early Massachusetts court opined:

The true rule would be, as in the case of other purchases, that the price is due and ought to be paid, at the moment the purchase is made, when credit is not specially agreed on. And if a . . . court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary, by the forms of law, to conduct the inquiry; and this delay must be compensated by interest. But in other respects the damages must be appraised upon the same rule, as they would have been on the day of the taking.

Parks v. City of Boston, 32 Mass. (15 Pick.) 198, 208–09 (1834).

Admittedly, a significant problem arises when setting the valuation date at the date of taking, for there is debate about when a taking actually occurs. Some states set the date of taking at the time of trial even though the condemnor might not have taken possession or received title at that time. *See* 5 JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 18.16 (3d ed. 2001). Presumably, this convention arose in states that set the date of valuation at the date of taking while permitting or requiring a compensation determination before title passed to the condemnor. *See, e.g.,* KY. REV. STAT. ANN. § 416.660(2) (Michie 1992); VA. CODE ANN. § 25-46.3 (Michie 2000). *See* Part III.B for a more detailed discussion of the taking date problem.

56. The term “trier of fact” is necessarily broad. Nearly every state permits the parties in a condemnation proceeding to try the issue of compensation before a court or jury. However, twenty-six states require an initial determination by a board of commissioners. *See* 7 PATRICK J. ROHAN & MELVIN A. RESKIN, *NICHOLS ON EMINENT DOMAIN* § 2A.03 tbl. II (2002). These states are Alaska, Colorado, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas,

be the date of taking. Some courts have reacted to this procedural difficulty by determining a valuation date earlier in time than the taking date.⁵⁷ State legislatures have also responded by adopting statutes that set the date of valuation, many of them mimicking the court-created standards.⁵⁸

The valuation date statutes of the several states are varied in both clarity and in the standards they adopt.⁵⁹ A few states have code sections specifically devoted to setting the date of valuation,⁶⁰ while others bury valuation date standards in codes that govern eminent domain procedure generally.⁶¹ Twenty-one states and the District of Columbia have no valuation date statute, even though all states and the district have fairly extensive eminent domain codes.⁶² This deficiency may be no accident. For example, Alabama, which has adopted the Uniform Eminent Domain Code ("UEDC") nearly in its entirety,⁶³ has expressly refused to adopt the UEDC's date of valuation section.⁶⁴ A date of valuation law is necessary, however, in

Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.* Interestingly, in Kentucky, the commission is to be composed of "three (3) impartial housekeepers of the county who are owners of land." KY. REV. STAT. ANN. § 416.580(1) (Michie 1992). Other states require some level of expertise from their commissioners. *See, e.g.*, IOWA CODE ANN. § 6B.4 (West 2001) (providing for twenty-eight commissioners in total, seven who own or operate agricultural property, seven who own city property, seven who are licensed real estate salespersons or brokers, and seven who have special property value knowledge because of their occupation).

57. *See* 3 SACKMAN, *supra* note 14, § 8.05[2] nn.19–30 (listing cases from states that have early valuation dates because of condemnation procedures that generally require compensation assessment before taking).

58. For a list by jurisdiction of the cases that provide these standards, *see* 5 SACKMAN, *supra* note 14, § 18.16 nn.1–21 (2001).

59. *See infra* app. (summarizing each state's statutory treatment of valuation dates).

60. *See, e.g.*, CAL. CIV. PROC. CODE §§ 1263.110–.130 (West 1982); HAW. REV. STAT. § 101–124 (1993); MD. CODE ANN., REAL PROP. § 12-103 (1996); N.J. STAT. ANN. § 20:3-30 (West 1997); S.C. CODE ANN. § 28-2-440 (Law. Co-op. 1991); WYO. STAT. ANN. § 1-26-703 (Michie 1997); *see also infra* app.

61. *See, e.g.*, WASH. REV. CODE §§ 8.04.092, 8.12.190 (1992); WIS. STAT. §§ 32.09(1), 32.05(7)(c), 32.06(7) (1998); *see also infra* app.

62. *See infra* app. The states with no valuation date statute are Alabama, Arkansas, Connecticut, Delaware, Georgia, Iowa, Kansas, Maine, Minnesota, Missouri, Nebraska, New Hampshire, New York, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, and West Virginia. *See infra* app.

63. *See* THEODORE J. NOVAK ET AL., CONDEMNATION OF PROPERTY: PRACTICE AND STRATEGIES FOR WINNING JUST COMPENSATION § 16.3, at 131 (1994).

64. *See* ALA. CODE § 18-1A-170 commentary (1997) ("The 'compensation standard' under the UEDC [(Uniform Eminent Domain Code)] is stated in UEDC Section 1002. That

order to determine property value,⁶⁵ so states like Alabama that have no valuation date statute must rely—intentionally or unintentionally—on their common-law standards.

A few states have well-developed valuation date statutes. California, for example, provides three methods of valuation in its eminent domain code.⁶⁶ First, unless there is an earlier appropriate date, the valuation date is the date that the condemnor deposits probable compensation with the court.⁶⁷ Second, if there is to be a trial on the issue of compensation, and the trial occurs within one year of the condemnation proceeding's commencement, then the valuation date is the proceeding's commencement date.⁶⁸ Third, unless the landowner has caused the delay, if the trial on compensation begins after one year from the proceeding's commencement, then the valuation date is the date of the trial's commencement.⁶⁹ So, in California, the valuation date may be (1) the date of compensation deposit, (2) the date of proceeding commencement, or (3) the date of trial commencement. New Jersey also has a well-developed valuation date statute that provides multiple valuation options: (1) the date that the condemnor possesses the property, (2) the date that the condemnation proceeding commences, or (3) the date that the condemnor's action "substantially affects the [condemnee's] use and enjoyment of the property."⁷⁰ Notably, New Jersey's third "use and enjoyment" provision affords a court considerable interpretative leeway to set the valuation date at very early stages of a condemnation action.⁷¹

'standard' is the 'fair market value determined . . . as of the date of valuation.' UEDC Section 1002 has been omitted from this Code . . . UEDC Section 1003 (Date of Valuation) also has been omitted from this Code.").

65. See 5 SACKMAN, *supra* note 14, § 18.16 (citing *United States v. Clarke*, 445 U.S. 253 (1980); *United States v. Miller*, 317 U.S. 369 (1943); *Olson v. United States*, 292 U.S. 246 (1934)).

66. California's eminent domain code sections are located at CAL. CIV. PROC. CODE §§ 1230.010–1273.050 (West 1982). The sections that specifically deal with valuation date determination are CAL. CIV. PROC. CODE §§ 1263.110–.130.

67. *Id.* § 1263.110.

68. *Id.* § 1263.120.

69. *Id.* § 1263.130.

70. N.J. STAT. ANN. § 20:3-30 (West 1997). The statute mentions a fourth possible date that applies only to abandoned property.

71. See, e.g., *Township of W. Windsor v. Nierenberg*, 695 A.2d 1344, 1358 (N.J. 1997) (holding in a 4-3 decision that the date of a letter sent to the landowner, informing her that her land *might* be condemned, was the effective date of valuation under N.J. STAT. ANN.

Overall, twenty-nine states have a valuation date statute of some kind. These various statutes describe a wide range of valuation dates, such as the date of summons, the date of trial on compensation, the date that the condemnation action begins,⁷² the date that the condemnor deposits probable compensation, and the date that the condemnor takes the land. The most common date of valuation is the date of summons or service of summons. Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, and Utah use this date. Similarly, Indiana values property on the service date of the “condemnation notice.”⁷³ Nevada’s valuation statute qualifies its summons date provision by setting the valuation date at the date of trial when trial begins more than two years after the first service of summons and when either the condemnor or court backlog caused the delay.⁷⁴ In fact, setting the valuation date at the date that trial on compensation commences is another common statutory option in the states. California, Colorado, Florida, Kentucky, Louisiana, Maryland, Nevada, Texas, and Washington have provisions that might require valuing at the trial date or at the date of a similar proceeding.⁷⁵ Alternatively, California, Illinois, Michigan, Mississippi, New Jersey, New Mexico, Virginia, and Wyoming may use the date that a condemnor files or commences the condemnation action.⁷⁶ Many

§ 20:3-30(c) (West 1997)).

72. A valuation date could even be before the condemnor commences action. *See supra* note 71.

73. *See* ALASKA STAT. § 09.55.330 (Michie 2000) (issuance of summons); ARIZ. REV. STAT. § 12-1123(A) (1994); HAW. REV. STAT. § 101-24 (1993); IDAHO CODE § 7-712 (Michie 1998); IND. CODE ANN. § 32-24-1-9(g) (Michie 2002) (service of condemnation notice); MONT. CODE ANN. § 70-30-302 (2001) (service of summons); NEV. REV. STAT. 37.120(1) (2001) (service of summons); UTAH CODE ANN. § 78-34-11 (1996); *see also infra* app.

74. *See* NEV. REV. STAT. 37.120(1) (2001); *see also infra* app.

75. *See* CAL. CIV. PROC. CODE §§ 1263.110–.130 (West 1982); COLO. REV. STAT. § 38-1-114(1) (2000); FLA. STAT. ANN. §§ 73.071(2), 74.051 (West 1987); KY. REV. STAT. ANN. § 416.660(2) (Michie 1992); LA. REV. STAT. ANN. §§ 19:9(A), :14, :153 (West 1979) (applying the valuation date to partial takings where the condemnor is port authority, state university, or state department of public works); MD. CODE ANN., REAL PROP. § 12-103 (1996); NEV. REV. STAT. 37.120(1) (2001); TEX. PROP. CODE ANN. § 21.042(b) (Vernon 2000) (time of special commissioners’ hearing); WASH. REV. CODE §§ 8.04.092, 8.12.190 (1992) (for condemnation actions by cities but not by the state); *see also infra* app. Some of these states may only list trial commencement as one of several valuation date possibilities, the application of which will depend upon the circumstances of particular cases. *See infra* note 79.

76. *See* CAL. CIV. PROC. CODE §§ 1263.110–.130 (West 1982); 735 ILL. COMP. STAT. ANN. § 5/7-121 (West 1992); MICH. COMP. LAWS ANN. § 213.70, sec. 20(3) (West 1998); MISS. CODE ANN. § 11-27-19 (1972); N.J. STAT. ANN. § 20:3-30 (West 1997) (date

states have condemnation procedures that permit or require the condemnor to deposit probable compensation with a court, and some of these states may value the property on the date of deposit, including California, Florida, and Louisiana.⁷⁷ Five states use the date of taking as the valuation date: Kentucky, Louisiana, Maryland, North Dakota, and Virginia.⁷⁸ Seven states—California, Colorado, Florida, Kentucky, Maryland, New Jersey, and Virginia—have statutory schemes that provide multiple alternative valuation dates depending on the circumstances of particular cases.⁷⁹

There are a variety of less common statutory provisions. For example, North Carolina sets the date of valuation at a time “immediately prior” to the condemnation action commencement,⁸⁰ and Pennsylvania probably requires a time “immediately before” the actual taking.⁸¹ In similar fashion, Massachusetts establishes the valuation date at a time before the recording of a taking order,⁸² and Louisiana may, depending on the circumstances, value property at a

condemnation proceedings commenced is one of four options); N.M. STAT. ANN. § 42A-1-24(A) (Michie 1994); *see also id.* § 42-2-15(A); VA. CODE ANN. § 25-46.3 (Michie 2000) (one of two options); WYO. STAT. ANN. § 1-26-703 (Michie 2001) (date condemnation action commenced); *see also infra* app.

77. *See* CAL. CIV. PROC. CODE §§ 1263.110–.130 (West 1982); FLA. STAT. ANN. §§ 73.071(2), 74.051 (West 1987) (if landowner does not request a hearing); LA. REV. STAT. ANN. §§ 19:9(A), :14, :153 (West 1979); *see also infra* app.

78. *See* KY. REV. STAT. ANN. § 416.660(2) (Michie 1992); LA. REV. STAT. ANN. §§ 19:9(A), :14, :153 (West 1979); MD. CODE ANN., REAL PROP. § 12-103 (1996); N.D. CENT. CODE § 32-15-23 (1996) (date of taking is the only statutory option); VA. CODE ANN. § 25-46.3 (2000); *see also infra* app. Even though each of these five states use the date of taking as the effective valuation date, they may define the date of taking differently, resulting in different valuation dates depending on the state. For a more detailed discussion of the problems associated with the date of taking, *see infra* Part III.A.

79. *See* CAL. CIV. PROC. CODE §§ 1263.110–.130 (West 1982); COLO. REV. STAT. § 38-1-114(1) (2000); FLA. STAT. ANN. §§ 73.071(2), 74.051 (West 1987); KY. REV. STAT. ANN. § 416.660(2) (Michie 1992); MD. CODE ANN., REAL PROP. § 12-103 (1996); N.J. STAT. ANN. § 20:3-30 (West 1997); VA. CODE ANN. § 25-46.3 (Michie 2000); *see also infra* app.

80. N.C. GEN. STAT. § 40A-63 (2002); *see also infra* app.

81. *See* 26 PA. CONS. STAT. § 1-602(a) (1997); *see also infra* app. Pennsylvania’s code does not clearly provide for valuation of a total taking. Section 1-602 directly applies to partial takings and states that the landowner receives the value of the *difference* between the property’s value before and after the taking. *See id.* § 1-602(a) (1997). A landowner in a total taking has no property left to value after the taking, so the concern is with the property’s value at (or “immediately before”) the time of taking. Hence, the statement in the text here is an extrapolation from the statutory language.

82. *See* MASS. GEN. LAWS ANN. ch. 79, § 12 (West 1993); *see also infra* app.

time before the condemnor proposed the taking.⁸³ In Colorado, if a condemnor possesses the condemned property prior to a trial on compensation, then the date of possession is the effective valuation date.⁸⁴ New Jersey has a similar time of possession provision.⁸⁵ Somewhat surprisingly, only one state—Florida—describes the possibility of valuation at the date that title actually passes to the condemnor.⁸⁶ Finally, Wisconsin's statutory framework provides that if the condemnation is for sewers or transportation, the valuation date is the date of the compensation's recording at the county register's office.⁸⁷ Otherwise, Wisconsin sets that valuation date at the date of filing of a *lis pendens*.⁸⁸

2. *The policy of valuation date statutes*

Sound policy considerations have likely motivated state legislatures to adopt date of valuation statutes. These policy considerations at least include preventing the hazards of property value fluctuations, increasing administrative efficiency, and providing consistency and predictability. Ultimately, these considerations are secondary to the policies that support the constitutional just compensation mandate.⁸⁹ Any statutory valuation scheme must not deny the landowner just compensation for his or her taken property.

First, and perhaps most importantly, valuation date statutes attempt to deal with property value fluctuations.⁹⁰ Property values do not remain constant over time,⁹¹ and indeed, they can change

83. See LA. REV. STAT. ANN. §§ 19:9(A), :14, :153 (West 1979); see also *infra* app.

84. See COLO. REV. STAT. § 38-1-114(1) (2000); see also *infra* app.

85. See N.J. STAT. ANN. § 20:3-30(a)-(d) (West 1997) (one of four options, the earliest of which is the proper valuation date); see also *infra* app.

86. See FLA. STAT. ANN. §§ 73.071(2), 74.051 (West 1987); see also *infra* app.

87. See WIS. STAT. §§ 32.09(1), 32.05(7)(c), 32.06(7) (1998).

88. See *id.*; see also *infra* app.

89. See *supra* text accompanying notes 47-50.

90. See, e.g., *Saratoga Fire Prot. Dist. v. Hackett*, 118 Cal. Rptr. 2d 696, 701 (Ct. App. 2002) ("[T]he primary purpose of the Legislature in enacting section [1263.120, formerly section 1249,] was to protect the parties against fluctuations in the market value of real property.").

91. See 3 SACKMAN, *supra* note 14, § 8.05 ("The value of real estate is by no means constant, and before compensation can be intelligently assessed for the taking of land by eminent domain, a point of time must be fixed as of which the property is to be valued."); see also 5 *id.* § 18.16.

drastically in a few weeks or months.⁹² Consequently, since triers of fact in condemnation proceedings must determine value and award just compensation, necessity demands a time of valuation. With a definite valuation date, the trier of fact or the parties can retain appraisers and begin the sometimes laborious and often time-consuming process of property valuation.⁹³ There is, however, a deeper justification than necessity: Date of valuation statutes protect *both* parties in a condemnation proceeding from value fluctuations. Condemnors will not have to pay more compensation if the value increases before the trier determines the compensation amount,⁹⁴ and the condemnees will not have to receive less compensation if their land values decrease.⁹⁵ Conversely, condemnors cannot take advantage of value depreciations, and condemnees may not benefit from value increases.⁹⁶ In the case of depreciation, the condemnors' own actions often cause the decrease in land value.⁹⁷ Ultimately, the

92. See, e.g., *Saratoga Fire*, 118 Cal. Rptr. 2d at 701 (property value increased sixty percent, from \$2 million to \$3.2 million, in a ten month period).

93. For a detailed summary of the appraisal process, see EATON, *supra* note 6.

94. See, e.g., *Utah State Rd. Comm'n v. Friberg*, 687 P.2d 821, 830 n.8 (Utah 1984) ("A publicly announced general plan of area-wide condemnation may have the effect of artificially increasing the value of properties not initially included in the area to be condemned before judicial proceedings have been commenced, thereby resulting in a windfall to the landowner Although the constitutional guarantee of just compensation protects private property owners and not the State, our interpretation of [Utah's valuation date statute] . . . allows an appropriate adjustment in the date of valuation to be made to protect the State against having to pay an award of compensation unfair to it."); *Casino Reinvestment Dev. Auth. v. Hauck*, 722 A.2d 949, 952 (N.J. Super. Ct. App. Div. 1999) ("The statute is also designed to insulate the condemnor from the ravages of an inflationary spiral' resulting from the anticipation of a governmental taking.").

95. See, e.g., *City of Cleveland v. Kacmarik*, 177 N.E.2d 811, 813 (Ohio Ct. Com. Pl. 1961) ("As houses begin to come down, tenants in nearby homes move out, the neighborhood deteriorates or is deserted, vandalism often sets in, appearances and values depreciate with the result that frequently the property owner is greatly handicapped in presenting his case to the jury by the time his land gets into court."); *Hauck*, 722 A.2d at 952 ("The object of [New Jersey's valuation date law] is thus 'to protect the condemnee from a decrease in the value of its property which is attributable to the cloud of condemnation' caused by the acts of the condemnor.").

96. Value increases that could benefit the condemnee may be at issue if the actual taking occurs after value determination. See, e.g., *Saratoga Fire*, 118 Cal. Rptr. 2d 696; see also *infra* Part III.B.2. Consequently, the landowner might receive this benefit to satisfy the demands of the just compensation principle.

97. See *Kacmarik*, 177 N.E.2d at 813; *State v. Hammer*, 550 P.2d 820, 828 (Alaska 1976) (reasoning that the policy underlying a valuation date set at the date of summons issuance was to prevent the state from taking advantage of the drop in property values that occurs when the state condemns property). Interestingly, at least one state has attempted to

interest in protecting the landowner from land value depreciation outweighs the apparent loss to the condemnor.

Valuation date statutes also afford the governing body some degree of administrative efficiency.⁹⁸ When the date is set, courts or hearing commissions can avoid argument on what the proper date is and focus instead on determining value. Furthermore, parties can move forward with collection of evidence to demonstrate value as of the set date, and the proceeding can move forward and terminate without a burdensome, continual updating of the valuation evidence. Importantly, legislatures probably imagined that the condemnation actions would proceed quickly.⁹⁹ Valuation date laws theoretically streamline the process and encourage it to end before land values can change much.¹⁰⁰

Valuation date statutes also attempt to provide consistency and predictability. With a clearly established valuation date, the triers of fact and the parties to condemnation actions can determine the appropriate valuation date and develop reasonable expectations about the required evidence and the ultimate result. Also, condemnors will know in advance of a condemnation action how the property will be valued, and knowing this information may affect the decision to take the property. Notably, consistency and predictability are not always the rule since just compensation is the overriding principle in value determinations. A trier of fact might apply a valuation date that is different than the statutorily created date in order to meet the constitutional mandate, though a properly drafted statute could avoid a trier's need to disregard statutory language.¹⁰¹

deal with condemnor-caused valuation changes by statute. *See* 26 PA. CONS. STAT. § 1-604 (1997) ("Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation . . . shall be disregarded in determining fair market value.").

98. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 n.15 (1984).

99. *See, e.g., Saratoga Fire*, 118 Cal. Rptr. 2d at 700 ("The purpose of our eminent domain statutes is obvious. The Legislature undoubtedly envisioned speedy acquisitions and timely compensation.").

100. *See id.*

101. That courts occasionally disregard valuation date statutes to provide just compensation goes to the heart of the problem this Comment discusses. *See infra* Part III.B; *see also* *Mayor of Balt. v. Kelso Corp.*, 380 A.2d 216 (Md. 1977) (holding that the valuation date cannot be applied to deprive a property owner of the just compensation he or she is entitled to receive under the Maryland Constitution). *But see* *Casino Reinvestment Dev. Auth. v. Hauck*, 722 A.2d 949 (N.J. Super. Ct. App. Div. 1999) (rigidly applying the date of valuation law).

III. THE DATE OF VALUATION DILEMMA

The date of valuation dilemma is simply explained. Condemnees are entitled to the value of their taken property when they are forced to surrender all rights to use, enjoy, and possess it.¹⁰² Valuation date statutes often set the valuation date at a time earlier than the time condemnees surrender¹⁰³ these rights. If the property value increases materially between the date of valuation and the time that condemnees actually relinquish their rights, then application of the date of valuation statute denies just compensation.¹⁰⁴ A court with jurisdiction over the condemnation matter must decide between enforcing the valuation date law or upholding the principle of just compensation.

Although articulating the date of valuation dilemma is simple, resolving it is not. The explication and resolution of the dilemma lies on two levels. First, the condemnee is entitled to compensation at the time that he or she last had rights to his or her property, which is at the time of taking (or immediately before the taking), but it is not clear what qualifies as a taking. Consequently, it is difficult to determine the time a taking occurred and the concurrent surrender of property rights by the condemnee. Second, assuming the time of taking is established, a court overseeing a condemnation matter must

102. See *supra* note 55 and accompanying text; see also 3 SACKMAN, *supra* note 14, § 8.05 (The value of property taken by eminent domain “is determined as of the time that the owner is entitled to receive.”). Effectively, the landowner’s surrender of rights occurs at the time of taking. See *infra* Part III.A.

There are those who have argued that the taking occurs prior to the landowner’s surrender of legal property rights. In *Kirby Forest Industries, Inc. v. United States*, 467 U.S. at 13, the Supreme Court framed the argument: “The filing of a complaint in condemnation and a notice of *lis pendens* . . . has the effect of preventing the owner of unimproved land thereafter from making any profitable use of it, or of selling it to another private party.” The Court rejected the argument under the case’s particular facts and reasoned that “[u]ntil title passed to the United States, [the landowner] was free to make whatever use it pleased of its property.” *Id.* at 15.

103. Use of the term “surrender” here does not also imply the power of the condemnee to refuse to give up the rights. When the government takes land for a legitimate public use, the condemnee cannot refuse. He or she is, however, entitled to just compensation for the taking. In *County of Dona Ana v. Bennett*, 867 P.2d 1160, 1164 (N.M. 1994), the court states that property should be valued at the time that the condemnee “loses control” over the property, which is perhaps more precise terminology.

104. Importantly, the date of valuation dilemma is not about paying interest on a compensation award. Post-judgment interest compensates a condemnee for the lost value of money. The date of valuation dilemma instead focuses on a land value change between the valuation date and the actual taking.

still determine how that taking date is useful for providing the landowner just compensation. For example, suppose in a particular jurisdiction that there is an accepted court rule or legislative mandate that a taking occurs when the condemnor possesses the property, dispossessing the condemnee. Assume that in a condemnation action the possession actually occurs several months after a trial on compensation, and the taken land's value increases significantly between trial and actual possession.¹⁰⁵ The date of valuation is a separate determination from the date of taking, so if the legislature has also ruled that the summons date or the trial date is the date of valuation, then the condemnee will not receive just compensation if the statute is applied.

This very problem has arisen in a surprising number of cases.¹⁰⁶ Furthermore, it has the potential to arise again because the valuation date laws in the several states establish valuation dates at various times, apparently without considering the condemnee's surrender of property rights as a factor in determining the valuation date.¹⁰⁷ Courts in states that have laws permitting a valuation date at a time different than the time that the condemnee actually surrenders property rights can encounter the date of valuation dilemma. In the following discussion, section A deals with the first level of the valuation date problem by examining the related date of taking problem. Section B discusses leading judicial responses to the valuation date dilemma.

A. The Related Date of Taking Problem

The date of valuation always stands in relation to the date of taking. There can be important effects on valuation date analysis depending on whether the taking occurs before or after the condemnor provides compensation.¹⁰⁸ Some states require that

105. This hypothetical situation is similar to the factual situation described in *Saratoga Fire*, 118 Cal. Rptr. 2d at 697-98, except that in *Saratoga Fire* the condemnor had not yet taken possession while the property value had increased significantly from the date of valuation. See *infra* Part III.B.2.

106. See *infra* Part III.B.

107. In these states, the legislatures appear to have focused more on relieving administrative burdens and dealing with other policy considerations than on the substantive question of when a taking actually occurs. See *supra* Part II.B.2.

108. See 11A MCQUILLIN, *supra* note 14, § 32.97.

compensation occur before the taking,¹⁰⁹ and this requirement raises obvious concerns about when to value the property: a property cannot be valued at taking if it cannot be taken until valued. In order to meet the just compensation requirement, states in this category may have to adjust their standards and either value property at the time of taking or permit adjustment of the compensation amount after a trial on compensation.

At first glance, the question of when a taking occurs may be simply answered by reference to the time that the government actually takes the land; however, it is not clear when this action occurs. It may be that the government takes when it physically possesses the property. Or, the taking may occur when the government begins the condemnation proceeding. Alternatively, the government may effectively take the land when it merely decides or proposes to exercise its eminent domain right. There is no consensus among the states.¹¹⁰

Before dealing with the factors that mark the taking date, it is important to understand the procedures that governments generally use to take property by eminent domain. While each state has somewhat different procedures, the federal approach provides a good overview of the basic law.¹¹¹ Under the United States Code, the government has at least three methods for exercising its eminent domain right: (1) straight condemnation, (2) “quick take,” and (3) legislative taking.¹¹² A fourth, less common method is the taking by oust, which is not mentioned in the United States Code.¹¹³

The “straight condemnation” method is described in 40 U.S.C. § 3113.¹¹⁴ This procedure permits an authorized officer of the federal government to apply to the Attorney General, who in turn

109. See, e.g., GA. CODE ANN. § 22-1-5 (1982); IOWA CONST. art. 1, § 18; KAN. CONST. art. 12, § 4.

110. See 11A MCQUILLIN, *supra* note 14, § 32.97 (“[T]here is an apparent conflict in the authorities as to the time from which compensation is to be computed, due in part to differing ideas as to what constitutes a ‘taking . . .’”).

111. For a more detailed discussion of each state’s basic eminent domain procedure (with the exception of Maine, whose eminent domain procedure is scattered throughout its code), see 7 ROHAN & RESKIN, *supra* note 56, § 2A.03[1]–[51].

112. See 40 U.S.C. §§ 3113–3114 (2002); FED. R. CIV. P. 71A.

113. See Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 5 (1984).

114. See *also Kirby Forest*, 467 U.S. at 4 (citing 40 U.S.C. § 257, which was replaced by § 3113 in 2002).

may initiate the condemnation proceedings.¹¹⁵ Federal Rule of Civil Procedure 71A governs this proceeding.¹¹⁶ The district court may appoint a commission to determine the property's value, and following that determination, the government may either compensate the landowner that amount and take the land or seek dismissal of the condemnation action.¹¹⁷

The United States Code also provides for a "quick-take" procedure similar to procedures developed in various states.¹¹⁸ Section 3114 of 40 U.S.C. permits the condemning governmental entity to file a "declaration of taking" before judgment in the condemnation action.¹¹⁹ This declaration states that the government takes the property pursuant to the declaration. Hence, the taking occurs at the time of the declaration.¹²⁰ The government must deposit estimated compensation into the court at that time, and title and right to the land vest concurrent with the deposit.¹²¹ Subsequent judicial proceedings may still determine the appropriate amount of compensation, but the government is henceforth in possession of the property.¹²²

Two other methods of taking are the legislative taking and the oust. First, the federal government may exercise its eminent domain right by legislative enactment.¹²³ The legislation that effects the taking will also provide a special procedure for determining compensation after the taking occurs.¹²⁴ Second, with oust, the government expropriates privately owned property, not by any statutorily authorized procedure, but by physically entering the property and ousting the owner.¹²⁵ The owner has a right to bring a

115. 40 U.S.C. § 3113.

116. FED. R. CIV. P. 71A.

117. 40 U.S.C. § 3114.

118. *See id.* For examples of state "quick take" procedures, see ALASKA STAT. § 09.55.440 (Michie 2000); CAL. CIV. PROC. CODE § 1255.410 (West 1982); 735 ILL. COMP. STAT. ANN. § 5/7-103 (West 1992).

119. 40 U.S.C. § 3114.

120. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 4–5 (1984).

121. 40 U.S.C. § 3114; *see also Kirby Forest*, 467 U.S. at 4–5.

122. *See Kirby Forest*, 467 U.S. at 5.

123. *See id.*

124. *See id.*

125. *See id.* (citing *United States v. Dickinson*, 331 U.S. 745, 747–49 (1947)).

suit, known as an inverse condemnation suit,¹²⁶ to recover the value of the land on the date of the oust, which is the date of taking.¹²⁷

Quick takes, legislative takings, and ousts present the least analytical concern in determining when the taking occurs. It occurs when there is a judicial order accompanied by a deposit of compensation, a legislative enactment, or a physical entry and assertion of ownership. Straight condemnation is more enigmatic because three distinct events could be considered the taking. First, the taking may be said to occur at the time of physical possession where, similar to an oust, the government officially takes the land when it moves its agents onto the property and begins the intended project. Second, the taking may occur at the time that the government compensates the condemnee. Finally, the taking could occur when the title vests in the condemnor, which may be either when the government pays compensation (either to the condemnee or as a deposit into the court) or when a judicial or administrative order vests title. Any one of these options alone probably constitutes the time that the government takes the property since at any one of these events the condemnee surrenders legal right to the land.

Courts and legislatures have not always clearly responded to the takings date problem. The United States Supreme Court offered a rule in *Kirby Forest Industries, Inc. v. United States*,¹²⁸ but in doing so, the Court appeared to equivocate. The majority first held that “[u]nless a taking has occurred previously in actuality or by a statutory provision . . . , we are of the view that the taking in a condemnation suit . . . takes place upon the payment of the money award by the condemnor.”¹²⁹ Later, the Court reasoned that at the time of trial, which is when compensation must be determined, “no one knows when the United States will exercise its option to purchase the property, so adoption of the date of payment as the date of valuation is infeasible.”¹³⁰ The Court’s holding is not entirely

126. Inverse condemnation suits are so called because the owner, who is normally the defendant in a condemnation action, is the plaintiff in these kinds of suits.

127. *Kirby Forest*, 467 U.S. at 5 (citing *United States v. Dow*, 357 U.S. 17, 21–22 (1958)).

128. 467 U.S. 1.

129. *Id.* at 11 (citing *Danforth v. United States*, 308 U.S. 271, 284 (1939)).

130. *Id.* at 16–17. Admittedly, the first statement, cited *supra* note 129, deals directly with the time compensation is paid as the date of taking, whereas the statement quoted in this sentence deals directly with the date of valuation. However the two dates, as already demonstrated, are closely related: “[I]t should be apparent that identification of the time a

unhelpful, for a landowner surrenders legal right to taken property when the condemnor pays compensation. The most useful rule, however, would have included other date of taking options, such as the date of possession or the date title legally vests in the condemnor.¹³¹ Outside the Supreme Court, some states have dealt with the ambiguity of the taking date by state court judicial rules that set the taking date at the date of proceeding commencement.¹³² Such rulings settle the takings date question (perhaps arbitrarily), but they still give rise to the date of valuation dilemma if the takings date is not also the time that condemnees surrender their property rights. In other states, legislatures seek to overcome the need for such judicial rulings by statutorily assigning the date of taking.¹³³ Ultimately, however, the takings date is the date that the condemnnee must surrender legal right to the property, and any takings date determination must depend on when this relinquishment of rights occurs.

B. Leading Judicial Responses

Courts have responded to the date of valuation dilemma in various ways. In dealing with specific valuation date statutes, state

taking of a tract of land occurs is crucial to determination of the amount of compensation" *Id.* at 11.

The Court also approached the question of when a taking occurs in *United States v. Dow*, 357 U.S. 17 (1958), and ruled that the takings date was the date that the government entered the property. *See id.* at 24 ("[I]f the value of the property changed between the time the Government took possession and the time of filing, payment as of the latter date would not be an accurate reflection of the value of what the property owner gave up and the Government acquired."). In *Dow*, however, the government had entered the property three years before filing the condemnation action for purposes of determining just compensation. *Id.* at 18. If, in the alternative, the government entry did not occur for a period of time *after* the compensation proceeding, then the Court would likely determine an earlier takings date. The earlier date would be a time at which the condemnnee surrendered all rights to the property, such as at the time that the government paid compensation or otherwise acquired legal title. In any event, the latest a taking could occur would be when the government enters the land. *See id.* at 23–24.

131. As noted in the previous paragraph, a condemnnee surrenders his or her property rights (1) at the time of condemnor possession, (2) at the time of compensation, or (3) at the time title vests in the condemnor.

132. *See, e.g.,* Calmat of Ariz. v. State ex rel. Miller, 859 P.2d 1323, 1327 (Ariz. 1993) (proceeding commencement); W. Va. Dep't of Highways v. Roda, 352 S.E.2d 134, 138–39 (W. Va. 1986) (date of taking is the date of proceeding commencement).

133. *See, e.g.,* KY. REV. STAT. ANN. § 416.660(2) (Michie 1992) ("The taking date for valuation purposes shall be either the date the condemnor takes the land, or the date of the trial of the issue of just compensation, whichever comes first.").

courts have been faced with four options: (1) rule that the statute was unconstitutional or that a particular application of it was unconstitutional, (2) alter the date of valuation and rule that altering it falls within the meaning of the statute, (3) rigorously apply the statute, or (4) ignore the valuation date law and use a different standard. The following discussion briefly reviews the Supreme Court's *Kirby Forest* decision¹³⁴—which did not deal with a specific valuation date law but did offer valuable insight into how the Court might rule if faced with the valuation date dilemma—and four other cases that demonstrate how several jurisdictions have, in sometimes surprising ways, resolved the valuation date dilemma.

1. The Supreme Court's decision

The *Kirby Forest* case arguably settled the date of valuation problem eighteen years ago. The primary question that the Court dealt with was not what the date of valuation should have been, but what the date of taking was and whether interest could be computed from that date.¹³⁵ The date of the taking, the Court concluded, was the date that the government paid the landowner for the property.¹³⁶ This response has an obvious impact on property valuation, but the Court's most important insights on the valuation date dilemma emerge in its analysis of the interest question. The Court reasoned that, notwithstanding any interest award, if designating a date other than the date of payment as the valuation date “provide[s] the owner substantially less than the fair market value of his property on the date the United States tenders payment, it violates the Fifth Amendment.”¹³⁷ The facts of *Kirby Forest* demonstrate that this violating situation could easily arise.

In the *Kirby Forest* case, Kirby Forest Industries, Inc. (“Kirby Forest”), a forest products manufacturer, owned about 2,000 acres of forest land that the federal government wanted in order to create Big Thicket National Preserve.¹³⁸ In 1974,¹³⁹ Congress enacted

134. 467 U.S. 1.

135. *See id.* at 9.

136. *See id.* at 11. *But see supra* note 130 and accompanying text.

137. *Kirby Forest*, 467 U.S. at 17.

138. *See id.* at 6–7.

139. Interestingly, the National Park Service conducted a study in 1967 that resulted in a recommendation to create a 35,500 acre Big Thicket National Park in eastern Texas. *See id.* at 6. Kirby Forest's 2,000 plus acres were part of the recommended national park. *Id.* In response

legislation authorizing the Secretary of the Interior to acquire the land pursuant to the straight condemnation procedures now described in 40 U.S.C. § 3113.¹⁴⁰ After negotiations to purchase the land failed, the government instituted a condemnation action on August 21, 1978, and the compensation trial began before a hearing commission on March 6, 1979.¹⁴¹ The commission set compensation at \$2,331,202.¹⁴² Both parties objected, but on August 13, 1981, a district judge entered judgment awarding the commission's compensation amount plus interest running from August 21, 1978, which was the filing date of the condemnation action.¹⁴³ The United States finally made its payment of compensation on March 26, 1982, three years after the date upon which the hearing commission valued the property.¹⁴⁴

Kirby Forest requested that the Court award interest for the time period between the valuation date and the taking date, but the Court declined, noting that changes in land market values "bear[] only a tenuous relationship to the market rate of interest."¹⁴⁵ Instead of an interest payment, the Court proposed a procedure for modifying the compensation award "when there is a *substantial delay* between the date of valuation and the date the judgment is paid, during which time the value of the land changes *materially*."¹⁴⁶ Specifically dealing with the litigants in *Kirby Forest*, the Court remanded the case for consideration of the land's value on the date that the government paid compensation.¹⁴⁷ Speaking generally, however, the Court suggested that Rule 60(b) of the Federal Rules of Civil Procedure offered a solution to condemnees who were denied just

to the National Park Service's recommendation, the Texas Forestry Association issued a 1967 moratorium on all logging in the designated area. *Id.* So, when condemnation proceedings finally commenced in 1979, Kirby Forest had already foregone logging on its own land for twelve years. *See id.* at 6-7.

140. *See id.* at 7. At the time of the *Kirby Forest* case, the code section related to straight condemnation procedures was located at 40 U.S.C. § 257.

141. *See Kirby Forest*, 467 U.S. at 7.

142. *Id.* at 8.

143. *See id.*

144. *See id.*

145. *Id.* at 17.

146. *Id.* at 17-18 (emphasis added).

147. *See id.* at 19. On the condition that the district court would consider such land value evidence, the judgment of the court of appeals that the government owed Kirby Forest no interest was affirmed. *Id.*

compensation when the government failed to pay compensation (and consequently did not take) until after a substantial period elapsed from the date of valuation.¹⁴⁸ Rule 60(b) permits a court to amend a final order for “any . . . reason justifying relief from the operation of the judgment.”¹⁴⁹ Providing the constitutionally required just compensation is unquestionably a reason that justifies relief from judgment.

2. Leading state cases

In *Saratoga Fire Protection District v. Hackett*,¹⁵⁰ a California appellate court faced a constitutional challenge to California’s valuation date statute. The Saratoga Fire Protection District (“the District”) condemned the defendant’s office building to use as a residence for firefighters, offices, and parking.¹⁵¹ The District, pursuant to California’s eminent domain procedure, filed a condemnation action on December 17, 1999.¹⁵² California’s valuation date statute set this filing date as date of valuation for the trial on compensation, and the parties stipulated that the property was worth \$2 million on that date.¹⁵³ Before trial began on November 13, 2000, the defendant obtained two more appraisals. One, on October 5, 2000, valued the property at \$3,049,412, and the next, on October 12, 2000, revealed a fair market value of \$3.2 million.¹⁵⁴ The condemnee sought to introduce evidence of these later appraisals during trial, and the District objected by motion. The trial court reluctantly granted the motion, feeling bound by a history of rigid application of the state’s valuation date law.¹⁵⁵

148. *See id.* at 18.

149. FED. R. CIV. P. 60(b).

150. 118 Cal. Rptr. 2d 696 (Ct. App. 2002).

151. *Id.* at 698.

152. *See id.*

153. *See id.*; *see also* CAL. CIV. PROC. CODE § 1263.120 (West 1982).

154. *Saratoga Fire*, 118 Cal. Rptr. 2d at 698.

155. *See id.* at 698–99. As reported in the appellate court’s opinion, the trial judge stated: I feel constrained to grant that motion [to exclude the October 2000 appraisal evidence]. The statute is so clear; the history is so long. Some of the cases call this settled law. I feel that I have to do that. Now, having said that, there seems to be some unfairness here, to be candid, in this market with the way things are working. And it certainly wouldn’t be unreasonable for the Legislature to revisit this in terms of shortening the time period or changing the date of valuation under these circumstances. Particularly strikes me as unfair that if there’s a loss, that the

The *Saratoga Fire* court briefly mentioned each of California's three date of valuation methods, noting that the lower court properly applied section 1263.120 since the trial began within one year of the condemnation action's filing date.¹⁵⁶ However, the court held that section 1263.120, as applied to the defendant in this case, was both unjust and unconstitutional, and so it reversed the trial court's decision.¹⁵⁷ The court reasoned that the policy underlying just compensation, as required by both the federal and state constitutions, was to make sure the landowner was not forced to "contribute more than his proper share to the public undertaking . . . [and] to distribute throughout the community the loss inflicted upon the individual by the making of public improvements."¹⁵⁸ Citing both the United States Supreme Court's decision in *Kirby Forest* and a California Supreme Court decision, the *Saratoga Fire* court reiterated that "any substantial increase in the fair market value between the dates of valuation and taking must be paid in order to provide 'just compensation.'"¹⁵⁹ Section 1263.120 was, like "all condemnation law, . . . but a means to the constitutional end of just compensation,"¹⁶⁰ and where the statute failed to meet the constitutional mandate, the courts had to ensure that the landowner received just compensation.¹⁶¹

Another leading valuation date case is *County of Dona Ana v. Bennett*,¹⁶² in which the New Mexico Supreme Court upheld its

landowner bears the loss; but if there's an appreciation in value, the landowner doesn't benefit from that But the law is the law, as I understand it, and I'm granting your motion to exclude certain evidence . . . on that basis.

Id. at 699. Arguably, if there is a loss, the landowner does not bear it because the condemnor takes the land that has depreciated in value. However, in California the condemnor can abandon the taking for almost any reason for thirty days after filing the complaint, *see* CAL. CIV. PROC. CODE § 1268.510 (West 1982), and it is not inconceivable that the condemnor might do so if the land value significantly depreciated. *See also Saratoga Fire*, 118 Cal. Rptr. 2d at 700 ("[U]nless the condemnor has done some additional act which would estop him, he can abandon with near impunity." (citing *L.A. Unified Sch. Dist. v. Trump Wilshire Assocs.*, 50 Cal. Rptr. 2d 229, 233 (Ct. App. 1996))).

156. A more detailed description of California's date of valuation statutes is located *supra* notes 66–69 and accompanying text.

157. *See Saratoga Fire*, 118 Cal. Rptr. 2d at 704.

158. *Id.* at 701.

159. *Id.* at 702 (citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 17–18 (1984); *Redevelopment Agency v. Gilmore*, 214 Cal. Rptr. 904, 911 n.9 (1985)).

160. *Id.* at 704 (citation omitted).

161. *See id.*

162. 867 P.2d 1160 (N.M. 1994).

valuation date statute, but rejected a particular application of it as unconstitutional.¹⁶³ In *Bennett*, the Dona Ana County Board of Commissioners (“the Board”) condemned a portion of the landowner’s property in order to make highway improvements.¹⁶⁴ Using the state’s “quick take” condemnation procedure,¹⁶⁵ the Board obtained an August 7, 1987, preliminary order to enter the property, conditioned on the county’s deposit of just compensation with the court.¹⁶⁶ Subsequently, the county deposited the compensation amount, entered the property in November 1987, and began work on the highway improvements, removing nearly three thousand cubic yards of soil in the process.¹⁶⁷ The trial on compensation began October 31, 1988, at which time the trial court entered an order that made the August 7, 1987, preliminary order permanent as of November 19, 1987.¹⁶⁸ The court further disallowed any evidence regarding the value of the removed soil and then instructed the jury that November 19, 1987, was the takings date and the date of valuation.¹⁶⁹

New Mexico’s date of valuation statute sets the valuation date at the date that the condemnor files a condemnation petition.¹⁷⁰ The court reasoned that this date of valuation was impermissible because at the time that a condemnation petition is filed, there has not yet been a taking.¹⁷¹ If the property’s value does not change between the filing and the time that legal title vests in the condemnor, then there is no harm in using the filing date as the valuation date.¹⁷² Alternatively, if the land’s value increases between those two dates, then applying the statutory valuation date denies the landowner just compensation.¹⁷³ The statute, the court held, was in conflict with the state constitution.¹⁷⁴ Ultimately, the court held that the date that the preliminary order became effective was the valuation date because

163. *See id.* at 1162.

164. *See id.*

165. *See* N.M. STAT. ANN. § 42-2-1 to -3 (Michie 1978).

166. *See Bennett*, 867 P.2d at 1162.

167. *See id.*

168. *See id.*

169. *See id.* at 1162–63.

170. *See* N.M. STAT. ANN. § 42-2-15(A) (Michie 1978).

171. *Bennett*, 867 P.2d at 1164.

172. *See id.* at 1165.

173. *Id.*

174. *Id.* at 1164–65.

the preliminary order “vest[ed] the condemnor with possession, dominion, and control over the premises.”¹⁷⁵ August 7, 1987, was the proper date of valuation.¹⁷⁶

The Utah Supreme Court encountered the valuation date dilemma in *Utah State Road Commission v. Friberg*.¹⁷⁷ Utah’s date of valuation statute provides that the date of summons is the effective date of valuation for condemned property.¹⁷⁸ In *Friberg*, the condemnees received summons for a condemnation action in June 1972; the state was taking their land in order to construct a freeway.¹⁷⁹ However, due in part to a separate legal battle over the state’s right to build the freeway, the condemnees remained in possession of the property until March 15, 1980.¹⁸⁰ In the interim, the land’s value appreciated significantly.¹⁸¹ The trial court eventually ruled on December 12, 1979, that the state had the right to condemn the property, but the court rigorously applied the valuation date statute and set the valuation date at June 23, 1972.¹⁸² On appeal, the Utah Supreme Court stated that it was “constrained to construe [Utah’s valuation date statute] within the limitations of constitutional requirements,” which demand just compensation.¹⁸³ “When valuation is fixed at a date prior to the actual taking and the value of the property increases during a prolonged condemnation proceeding so that the valuation does not . . . constitute ‘just compensation,’ the statute . . . is unconstitutional as applied.”¹⁸⁴ As with the opinions in *Saratoga Fire* and *Bennett*, the *Friberg* court likely recognized the administrative necessity of the valuation date statutes and only rejected applications that denied just compensation, which is the governing principle in value determinations.

The New Jersey Supreme Court recently examined the application of its date of valuation statute to a rather unique situation. In

175. *Id.* at 1164; *see also* N.M. STAT. ANN. § 42-2-6(A) (Michie 1978).

176. *Bennett*, 867 P.2d at 1165–66.

177. 687 P.2d 821 (Utah 1984).

178. Utah’s date of valuation statute is located at UTAH CODE ANN. § 78-34-11 (1996).

179. *See Friberg*, 687 P.2d at 825.

180. *See id.*

181. *Id.*

182. *Id.* at 828.

183. *Id.* at 829.

184. *Id.*

Township of West Windsor v. Nierenberg,¹⁸⁵ the court concluded that the effective date of valuation was the date of a letter addressed to the landowner indicating that the township *might* condemn her land.¹⁸⁶ The relevant New Jersey statute provided considerable room for courts to set a valuation date at any time that the condemnor's actions "substantially affect[ed] the use and enjoyment of the property by the condemnee."¹⁸⁷ Perhaps most remarkably, after applying the rather loose statutory standard to find a date very early in the condemnation process, the court concluded its decision with an apparent attempt to pacify condemnors: "Condemnors are not prejudiced by [the New Jersey valuation date statute] and, in fact, may benefit from its application in instances where governmental action precipitates a substantial increase in the value of the subject property."¹⁸⁸ Of course, this "benefit" entails the precise problem that this Comment addresses. Increases in land value before an actual taking should accrue to the landowner as part of just compensation.

IV. DEALING WITH THE DILEMMA

Without much question, valuation date statutes give rise to problems in providing condemnees just compensation. As noted, courts are generally capable of responding to problems that arise, particularly as they focus on meeting the constitutional just compensation requirement. Despite the courts' general aptitude, however, a well-crafted statute can more directly resolve the date of valuation dilemma by avoiding the dilemma in the first place. Legislators who are drafting valuation date laws can anticipate potential conflict and make statutory provisions that pre-empt the conflict, thus providing consistent and predictable guidance for judges and litigants.

Based on the analysis developed in Part III, a legislator must first establish the time of taking. The time or date of taking will be the earliest of (1) the time that the condemnor takes possession of the property,¹⁸⁹ (2) the time that the condemnor directly compensates

185. 695 A.2d 1344 (N.J. 1997).

186. *See id.* at 1346-47.

187. N.J. STAT. ANN. § 20:3-30(c) (West 1997).

188. *Nierenberg*, 695 A.2d at 1358.

189. *See United States v. Dow*, 357 U.S. 17 (1958).

the condemnee,¹⁹⁰ or (3) the time that the title vests in the condemnor through a judicial or administrative order.¹⁹¹ Each of these times marks the final dissolution of the condemnee's legal interest or rights in the land. In theory, the divestment of interest could occur as soon as the government thinks (metaphorically) "the property is mine" because the government's right of eminent domain has no condition of action.¹⁹² In practicality, one of the three above actions is probably necessary to establish the condemnor's ownership.

Importantly, the date of taking cannot occur before a time that the government action is irrevocable. If the government can revoke its decision to take, then it really has not taken the property yet. Current statutory schemes, however, do not require irrevocability, as detected by the *Saratoga Fire* court: "[U]nless the condemnor has done some additional act which would estop him, he can abandon with near impunity."¹⁹³ Worse, because of this right to abandon, the condemnor may take advantage of all benefits while passing along the loss in land value to the original condemnee.¹⁹⁴ In effect, the initiation of a condemnation proceeding would be illusory as the condemnor could commence the proceedings, abandon the action as land values become depressed in a recessionary market, and then recommence the proceedings to take advantage of lower land prices.¹⁹⁵

Under ideal circumstances, just compensation would occur at the time of taking and would be a complete and adequate compensation for the property, valued in that instant.¹⁹⁶ In other words, the date of valuation should be the date of taking. Practically, though, value determination takes time, and the parties must turn to the market and to their appraisers in order to gather evidence that will persuade

190. See *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984).

191. See *County of Dona Ana v. Bennett*, 867 P.2d 1160, 1164 (N.M. 1994); see also *supra* notes 128–33 and accompanying text.

192. See *supra* text accompanying notes 15–33.

193. See *Saratoga Fire Prot. Dist. v. Hackett*, 118 Cal. Rptr. 2d 696, 700 (Ct. App. 2002) (quoting *L.A. Unified Sch. Dist. V. Trump Wilshire Assocs.*, 50 Cal. Rptr. 2d 229, 233 (Cal. App. 1996)).

194. See *id.* at 699; *Township of W. Windsor v. Nierenberg*, 695 A.2d 1344, 1358 (N.J. 1997).

195. The situation is somewhat analogous to illusory transfers as developed in the law of wills and estates. See, e.g., *Pezza v. Pezza*, 690 A.2d 345, 348–49 (R.I. 1997).

196. See *supra* note 55.

the trier of their valuation. So, even if the eventual valuation date is the date of taking, as it should be, preliminary valuation dates may be necessary for trial on compensation to go forward. Legislators can avoid potentially arbitrary and inconsistent court rulings by providing such dates in the date of valuation statute. States with constitutions that require compensation before taking¹⁹⁷ should be particularly attentive to this issue and provide a preliminary valuation date, as well as provisions to allow adjustment after the condemnor pays compensation.¹⁹⁸

In properly drafting valuation date laws, legislatures must also deal with the possible effect of the government's condemnation announcement on property values. Since announcement alone often affects the market value of condemned property,¹⁹⁹ if the property is valued at the time of taking, then that value includes the announcement's effect. The answer in drafting the law is that the value must be adjusted for the announcement.²⁰⁰ The governing principle is just compensation, and the policy is that the owner must be put in the position he or she would have occupied had the taking never occurred.²⁰¹

Despite the value in establishing the valuation date at the time of taking, competing rationales that motivated the previous date of valuation determinations still exist. For example, some states have set the valuation date at the date summons is issued. The rationale for this determination probably runs to the very foundation of eminent domain theory: a state's right to take by eminent domain is inherent in the state's power, and it is only qualified by the public use and just compensation limitations.²⁰² The moment a state determines that it needs property for public use, the property belongs to the state.

197. *E.g.*, Georgia, Iowa, and Kansas. *See supra* note 109.

198. There could still be theoretical problems. The compensation could be adjusted after the initial trial, but that would mean that the compensation process is not complete, and until paid in full, there can be no taking. One can conceive of an endless cycle of valuation and re-valuation with the taking never coming to fruition. Of course, in practicality, the adjustment after initial compensation (to make the compensation "just") would probably never be viewed by a court as an unconstitutional compensation *after* taking.

199. *See supra* notes 94–97.

200. Appraisers are generally capable of making such an evaluation by valuing nearby similar, but non-condemned, properties. For a discussion of appraiser considerations during valuation, see EATON, *supra* note 6.

201. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).

202. *See supra* Part II.A.

Summons is a mere formality to inform the condemnee that the property belongs to the government. Furthermore, the date of summons marks at least one clear time to consider the property taken. If the land does not yet “belong” to the government, it will, and the only issue remaining is how much the government will compensate the condemnee. The reason that rationales for early valuation dates—like the date of summons, or of filing, or of trial—are unconvincing is that they do not accurately reflect the condemnee’s actual retention of concrete rights. The taking occurs, and the property should be valued, when the condemnee surrenders those rights.

In addition to clear valuation date statutes, state valuation date laws need additional constitutional procedures, similar to those articulated in the *Kirby Forest* case, that permit courts to alter a value determination upon motion after the trial on compensation amount. Perhaps reference to a Rule 60(b)-type procedure is adequate, although a specific provision, tied directly to land value determinations in condemnation proceedings, would remove doubt as to how to proceed when land values shift dramatically between the practical valuation date and the actual taking.

In addition to crafting new legislation, legislatures seeking to deal with the valuation date dilemma have at least three other options: (1) require the government to take before compensation, (2) make no new legislation, and (3) modify existing laws. First, a legislature could avoid the difficulty of setting a valuation date by requiring the condemnor to always take before compensation. Most states already have statutes that permit this procedure, usually known as a “quick-take.”²⁰³ The procedure avoids the difficulties of date valuation because the property is valued at the time that the owner last had an interest in it: the date of possession or taking. A difficulty with this approach in some states is that their constitutions or statutory schemes require compensation prior to taking.²⁰⁴ Aside from the constitutional concerns, there are policy considerations. Even though the right of eminent domain is inherent in the sovereign’s power, using the quick-take method with every taking might become politically unpopular,

203. See *supra* notes 118–22 and accompanying text.

204. See *supra* note 109 and accompanying text.

especially in our modern society with a burgeoning population that calls for more and more taking of land for public works.²⁰⁵

A legislature may also choose to make no changes to existing statutory law. Courts have demonstrated that they will ignore the date of valuation statutes when the statutes fail to provide just compensation and enforce them when they do.²⁰⁶ The statutes will continue to operate in the cases where there is little dispute as to compensation, fulfilling their purpose to promote administrative efficiency. Significantly, many cases that deal with the date of valuation dilemma indicate that application of the relevant valuation statute is intensively fact specific,²⁰⁷ so cases in which the valuation date dilemma arises may require the fact-specific attention a judge or jury can provide.

Legislatures may choose to retain their existing statutes and amend them with provisions on how to deal with the valuation date dilemma. California drafted a statute that attempted to prevent the inadequate compensation that may occur when property values fluctuate significantly between the valuation date (proceeding commencement) and the date of taking.²⁰⁸ The statute moves the valuation date to a later time if the compensation trial occurs more than one year after the condemnation proceedings commence.²⁰⁹ However, this one-year, bright-line standard has since failed to provide just compensation.²¹⁰ The best approach is probably to amend existing laws with the judge-articulated standards from *Kirby*: The states' old valuation date standards apply unless there is a "substantial delay," during which the land value "materially"

205. Congress may have had this concern in mind when drafting the 1974 legislation that authorized the Secretary of the Interior to acquire east Texas forest lands for the Big Thicket National Preserve. See *Kirby Forest*, 467 U.S. at 6–7. The Secretary was authorized to use the "quick take" procedures under 40 U.S.C. § 258a only if necessary to protect land from destruction. See *id.* at 7. Otherwise, Congress required the Secretary to use straight condemnation procedures under 40 U.S.C. § 257, which initially involve negotiations for purchase of "condemned" property. *Id.*

206. See *supra* Part III.B.1–2.

207. See generally *Saratoga Fire Prot. Dist. v. Hackett*, 118 Cal. Rptr. 2d 696 (Ct. App. 2002); *Utah State Rd. Comm'n v. Friberg*, 687 P.2d 821 (Utah 1984); see also *County of Dona Ana v. Bennett*, 867 P.2d 1160 (N.M. 1994). In fact, it seems that if the court mentions the fact-specific nature of the question early in the decision, it is almost sure to rule against applying the valuation date statute in that case.

208. See CAL. CIV. PROC. CODE §§ 1263.110–.130 (West 1982).

209. See *id.*

210. See *Saratoga Fire*, 118 Cal. Rptr. 2d at 696.

changes.²¹¹ If these conditions are met, then the material change in value warrants altering any judgment based on a previous date of valuation. Granted, permitting re-evaluation after the compensation determination may promote delay due to the condemnee's (or the condemnor's) attempt to stretch out an inflationary (or recessionary) period, but the statute writers could include provisions about defendant-caused delay.

V. CONCLUSION

The United States Constitution and the various state constitutions require just compensation for landowners whose land is taken by a condemning authority. Aside from a requirement that takings be for public use, this just compensation requirement is the only limitation on the government's exercise of its eminent domain right. Hence, any procedure that legislatures institute to govern eminent domain must abide by this constitutional just compensation principle.

Valuation date statutes are useful additions to state eminent domain procedure codes. They permit the courts and hearing commissions that handle condemnation actions to use fixed points in time at which to value property. Settling on a time to appraise condemned land avoids the uncertainty of ever-shifting land values, and it eases the administrative burden of hearing evidence on when the valuation date should be. However, these same valuation date laws may be the source of constitutional violations. A landowner is entitled to just compensation for condemned property at the time that the government takes the land. If the valuation date occurs weeks or months or years before the government actually takes the land, and if the land's value increases materially between the valuation date and the taking date, then the landowner will not receive just compensation if the court or hearing commission rigorously applies the valuation date law. Legislatures can avoid putting courts in the position of choosing between constitutional and statutory provisions by drafting appropriate legislation. Clear statutory guidance on what constitutes a taking and under what circumstances courts must alter a condemnation award in order to

211. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 17-18 (1984). These standards are admittedly less precise than bright-line standards, but they offer flexibility for courts to deal with the intensely fact-specific process of valuing property at the proper time.

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provide just compensation will help produce consistent and predictable results for courts and the parties who appear before them.

Christopher A. Bauer

APPENDIX

Date of Valuation Statutes in the Fifty States
and in the District of Columbia

| STATE | CODE SECTION* | BASIC PROVISIONS** |
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| Alabama | [ALA. CODE §§ 18-1A-1 to -311 (1997 & Supp. 2001).] | No specific valuation date statute. |
| Alaska | ALASKA STAT. § 09.55.330 (Michie 2000). | Date of issuance of summons. |
| Arizona | ARIZ. REV. STAT. § 12-1123(A) (1994). | Date of summons. |
| Arkansas | [ARK. CODE ANN. §§ 18-15-101 to -1505 (Michie 1987 & Supp. 2001).] | No specific valuation date statute. |
| California | CAL. CIV. PROC. CODE §§ 1263.110-.130 (West 1982). | Three options: (1) Date of deposit of probable compensation, unless there is an earlier appropriate date. § 1263.110. (2) Date of condemnation proceeding commencement if trial begins within one year of commencement. § 1263.120. |

* Bracketed code sections are the eminent domain codes of the states and district that do not have date of valuation statutes.

** Importantly, states listed as having no specific valuation date statute may have a judicially-created standard that governs condemned property valuation.

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| California continued | | (3) Date of trial commencement if trial begins later than one year after condemnation proceeding commencement, unless there is landowner-caused delay. § 1263.130. |
| Colorado | COLO. REV. STAT. § 38-1-114(1) (2000). | The earlier of: (1) Date of possession. (2) Date of compensation trial or hearing. Compensation assessment remains subject to change for one year after initial determination. |
| Connecticut | [CONN. GEN. STAT. §§ 48-1 to -27 (1994 & Supp. 2002).] | No specific valuation date statute. |
| Delaware | [DEL. CODE ANN. tit. 10, §§ 6101-6115 (1999).] | No specific valuation date statute. |
| District of Columbia | [D.C. CODE ANN. §§ 16-1301 to -1385 (2001).] | No specific valuation date statute. |
| Florida | FLA. STAT. ANN. §§ 73.071(2), 74.051 (West 1987). | The earlier of: (1) Date of trial. (2) Date on which title passes. Or Date of deposit if landowner does not request a hearing. |
| Georgia | [GA. CODE ANN. §§ 22-1-1 to -4-15 (1982 & Supp. 2002).] | No specific valuation date statute. |
| Hawaii | HAW. REV. STAT. § 101-24 (1993). | Date of summons. |
| Idaho | IDAHO CODE § 7-712 (Michie 1998). | Date of summons. |
| Illinois | 735 ILL. COMP. STAT. ANN. § 5/7-121 (West 1992). | Date of filing complaint to condemn. |

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| Indiana | IND. CODE ANN. § 32-24-1-9(g) (Michie 2002). | Date of service of a condemnation notice. |
| Iowa | [IOWA CODE ANN. §§ 6B.1-.59 (West 2001 & Supp. 2002).] | No specific valuation date statute. |
| Kansas | [KAN. STAT. ANN. §§ 26-101 to -517 (2000).] | No specific valuation date statute. |
| Kentucky | KY. REV. STAT. ANN. § 416.660(2) (Michie 1992). | The date of taking, which is the earlier of: (1) Date the condemnor takes the land. (2) Date of compensation trial. |
| Louisiana | LA. REV. STAT. ANN. §§ 19:9(A), :14, :153 (West 1979). | Not clear, but three possibilities: (1) Time before condemnor proposed the taking. § 19:9(A). (2) Time of taking. § 19:14 (3) Time condemnor deposited estimated compensation into court registry. § 19:153. Date of trial if determining damage to remainder in partial taking and if condemnor is port authority, state university, or a state department of public works. § 19:153. |
| Maine | [Maine's eminent domain code sections are disbursed throughout the entire code.] | No specific valuation date statute. |
| Maryland | MD. CODE ANN., REAL PROP. § 12- 103 (1996). | The earlier of: (1) Date of taking. (2) Date of trial. |
| Massachusetts | MASS. GEN. LAWS ANN. ch. 79, § 12 (West 1993). | Time before recording of taking order. |

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| Michigan | MICH. COMP. LAWS ANN. § 213.70, sec. 20(3) (West 1998). | Date of filing. |
| Minnesota | [MINN. STAT. §§ 117.011-.57 (1997 & Supp. 2002).] | No specific valuation date statute. |
| Mississippi | MISS. CODE ANN. § 11-27-19 (1972). | Date of filing complaint. |
| Missouri | [MO. REV. STAT. §§ 523.010-.215 (2002).] | No specific valuation date statute. |
| Montana | MONT. CODE ANN. § 70-30-302 (2001). | Date of summons. |
| Nebraska | [NEB. REV. STAT. §§ 76-701 to -726 (1996).] | No specific valuation date statute. |
| Nevada | NEV. REV. STAT. 37.120(1) (2001). | Two options: (1) Date of first service of summons. (2) Date trial commences if trial begins more than two years after first service of summons and the delay was primarily caused by condemnor or court backlog. |
| New Hampshire | [N.H. REV. STAT. ANN. §§ 498-A:1 to :31 (1997 & Supp. 2002).] | No specific valuation date statute. |
| New Jersey continued | N.J. STAT. ANN. § 20:3-30 (West 1997). | The earliest of: (1) Date of possession by condemnor. (2) Date condemnation action commenced. (3) Date that condemnor takes action that “substantially affects” the condemnee’s use and enjoyment of the property. |

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| New Jersey | | (4) Date of blight declaration by governing body if pursuant to a planning board report, or, in the case of a property on the abandoned property list and where there is no blight declaration, the date of the expiration of the condemnee's right to appeal the property's inclusion on the abandoned property list. |
| New Mexico | N.M. STAT. ANN. § 42A-1-24(A) (Michie 1994); <i>see also id.</i> § 42-2-15(A). | Date of filing petition. |
| New York | [N.Y. EM. DOM. PROC. LAW §§ 101-709 (McKinney 1979 & Supp. 1998).] | No specific valuation date statute. |
| North Carolina | N.C. GEN. STAT. § 40A-63 (2002). | Time "immediately prior" to filing of petition or complaint. |
| North Dakota | N.D. CENT. CODE § 32-15-23 (1996). | Date of taking. |
| Ohio | [OHIO REV. CODE ANN. §§ 163.01-.62 (Anderson 2001 & Supp. 2001).] | No specific valuation date statute. |
| Oklahoma | [OKLA. STAT. ANN. tit. 27, §§ 1-16 (West 1997 & Supp. 2002).] | No specific valuation date statute. |
| Oregon | [OR. REV. STAT. §§ 35.205-.415 (2001).] | No specific valuation date statute. |
| Pennsylvania | 26 PA. CONS. STAT. § 1-602(a) (1997). | Time immediately before and immediately after partial taking. No specific valuation date for total takings. |

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| Rhode Island | [R.I. GEN. LAWS §§ 37-6-1 to -6.1-12 (1997 & Supp. 2001).] | No specific valuation date statute. |
| South Carolina | S.C. CODE ANN. § 28-2-440 (Law. Co-op. 1991). | Date of filing condemnation notice. |
| South Dakota | [S.D. CODIFIED LAWS §§ 21-35-1 to -30 (Michie 1987 & Supp. 2002).] | No specific valuation date statute. |
| Tennessee | [TENN. CODE ANN. §§ 29-16-101 to 17-1202 (2000 & Supp. 2001).] | No specific valuation date statute. |
| Texas | TEX. PROP. CODE ANN. § 21.042(b) (Vernon 2000). | Time of the special commissioners' hearing. |
| Utah | UTAH CODE ANN. § 78-34-11 (1996). | Date of service of summons. |
| Vermont | [VT. STAT. ANN. tit. 24, §§ 2805–2813 (1992 & Supp. 2002).] | No specific valuation date statute. |
| Virginia | VA. CODE ANN. § 25-46.3 (Michie 2000). | The earlier of: (1) Date of lawful taking. (2) Date condemnor filed petition. |
| Washington | WASH. REV. CODE §§ 8.04.092, 8.12.190(1) (1992). | (1) Date of trial order granting the condemnor immediate possession if condemnor is state entity. (2) Date of trial if condemnor is city. No specific valuation date statute that governs county government condemnations. |

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| West Virginia | [W. VA. CODE §§ 54-1-1 to -2-21 (2000 & Supp. 2002).] | No specific valuation date statute. |
| Wisconsin | Wis. STAT. §§ 32.09(1), 32.05(7)(c) & 32.06(7) (1998). | (1) Date of recording of award in county register's office after condemnor paid award if in a condemnation action for sewers or transportation. (2) Date of filing of lis pendens if in a condemnation action for purposes other than transportation. |
| Wyoming | WYO. STAT. ANN. § 1-26-703 (Michie 2001). | Date that condemnation action commenced. |

Note on Uniform Eminent Domain Code: The National Conference of Commissioners on Uniform State Laws adopted the Uniform Eminent Domain Code ("UEDC") in 1974. *See* NOVAK ET AL., *supra* note 63, § 16.3, at 131 (1994). "Alabama is the only state to substantially adopt this code, effective as of January 1, 1986." *Id.* The UEDC contains a valuation date provision that sets the valuation date at either the date on which a plaintiff first makes a deposit or the date on which trial commences, whichever comes first. *Id.* § 16.5, at 133.